LETRIK BANDAR HUP HENG SDN BHD

v.

WONG SAI HONG

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[CIVIL APPEAL NO: R3-12-408-98]
10 DECEMBER 2001

CONTRACT: *Damages - Measure of damages - Proof of damages - Failure of - Whether sessions judge erred in making substantial award without proof of damages - Nominal damages*

The defendant/appellant appealed against the decision of the sessions court judge in allowing the plaintiff/respondent's claim for damages for breach of contract and awarded RM27,217.86 plus interests and costs against the defendant on the ground that it was fair and reasonable for the plaintiff to receive a profit at 12 1/2 of the subcontract price, although the amount was never agreed to by the parties. The issues that arose were: (i) whether the plaintiff was entitled to the damages in the absence of proof; and (ii) whether nominal damages ought to be made.

Held:

[1] The respondent's claim was a claim for damages and as such the respondent must prove the actual loss or damages which it failed to do. The amount claimed is substantial. The respondent had not tendered any proof through his witnesses nor through supporting documents or agreement that its profit was RM27,217.86. The respondent failed to provide factual evidence of how this profit was derived at. Without such evidence the award of RM27,217.86 was erroneous and ought not to be awarded by the learned judge, as the 12 1/2 profit was never fixed by agreement of both the parties as payable to the respondent for the breach of contract by the appellant. (p 172 e-f)

[2] Since the respondent failed to prove its damages, its claim must fail. The learned judge should not have accepted the sum as being fair and reasonable without the need for the respondent to prove its claim. It was therefore wrong for the learned judge to make such a substantial award without proof of damages. As it was quite impossible to assess damages with the evidence available, the court made the award of nominal damages. (p 173 c-d)

[Appeal allowed with costs.]

Case(s) referred to:
Bonham-Carter v. Hyde Park Hotel [1948] WN 89 ***(refd)***
Livingstone v. Rawyards Coal Co [1880] 5 AC 25 HL ***(refd)***
Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 ***(refd)***

Other source(s) refered to:
Chitty on Contracts, 26th edn, vol 1, p 1119, para 1775

For the appellant - Renu Zechariah (Ashley Onn Boon See); M/s Anad & Noraini
For the respondent - Joginder Singh (Manjeet Kaur); M/s Joginder Singh & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Nik Hashim J:
This is an appeal by the appellant against the decision of the learned Sessions Court judge given on 6 August 1998 in allowing the respondent's claim for damages for breach of contract and award of RM27,217.86 plus interest and costs against the appellant.

Briefly, the facts of the case are that the appellant was the main contractor in respect of electrical works being carried out at Megah Court, Jalan Kolam Air, Kuala Lumpur in 1990. The respondent was the appellant's subcontractor doing the actual electrical works. By the subcontract agreement, the appellant obtained 12 1/2 of the contract sum of RM248,849 ie, RM31,106.13 as it's profit. A few days after signing the subcontract, the appellant took over the contract works from the respondent because the appellant was not satisfied with the respondent's performance under the subcontract. The respondent argued that the appellant's action was wrongful and in breach of the subcontract and that he was entitled to the profit he would have made had he been allowed to continue with the subcontract works. Since the appellant obtained a profit of 12 1/2 under the subcontract, the respondent submitted it was only fair and reasonable that the respondent must be entitled to a profit at 12 1/2 of the subcontract price of RM217,742.87, ie, RM27,217.86 as the claim for the said amount arose naturally from the breach and quoted *Livingstone v. Rawyards Coal Co.* [1880] 5 AC 25 HL in support.

The learned judge agreed with the respondent's submission and allowed the award accordingly. Hence the appeal.

After hearing both parties, I, on 27 April 1999 allowed the appeal with costs only with regard to the award of the damages of RM27,217.86 and set aside the award and awarded nominal damages of RM10 instead on the ground that the respondent had failed to prove the damages. On the question of liability,

I agreed with the learned judge that the appellant was in breach of the subcontract. However, the respondent was dissatisfied with my decision with regard to the award of the damages. Hence, my reasons for the decision.

In a claim for an agreed sum, there is clearly a distinction between a claim for payment of an agreed sum and a claim for damages. *Chitty On Contracts*, 26th edn, vol. 1, General Principles at p. 1119 para. 1775 states:

> There is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract. A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or conditon; damages may be claimed from a party who has broken his contractual obligation in some way other than failure to pay such a debt ... The relevance of this distinction is that rules on damages do not apply to a claim for a debt, eg, the plaintif who claims payment of a debt need not prove anything more than his performance or occurrence of the event or condition; there is no need to prove actual loss suffered by him as a result of the defendant's failure to pay; the whole concept of remoteness of damage is therefore irrelevent, ...

In the present case, the respondent's claim is not a claim for payment of a debt but a claim for damages, and as such, the respondent must prove the actual loss or damages, which it failed to do. The amount claimed is substantial. The respondent had not tendered any proof through his witnesses nor through supporting documents or agreement that its profit was RM27,217.86. The respondent failed to provide factual evidence of how this profit was derived at. Without such evidence the award of RM27,217.86 was erroneous and ought not to be awarded by the learned judge, as the 12 1/2 profit was never fixed by agreement of both the parties as payable to the respondent for the breach of contract by the appellant. On the contrary, it was provided in the letter of award that it was the appellant who was entitled to 12 1/2 of the total contract sum.

In this context, the respondent needs to be reminded of Lord Goddard's classical dictum in *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

The *Livingstone*'s case has no application to the instant case which claim is based on the law of contract. In that case, the miner Coal Co. which was mining coal in adjoining lands excavated coal from beneath the plaintiff's land wrongfully. As to what damages were payable to the plaintiff landowner the

House of Lords decided that the best evidence in the peculiar circumstances of the case was the value of the royalty paid by the miner Coal Co. for the surrounding coal field and therefore the plaintiff landowner was entitled to the lordship on the coal excavated, calculated at that rate. Clearly, the claim in *Livingstone* was for damages in tort and the principles for damages applicable in contract and tort, however, are not the same (see *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635). In my view, the principle for damages in tort cannot apply to damages in contract because the law requires that actual loss or damages in contract must be proven.

Since the respondent failed to prove its damages, its claim must fail. The learned judge should not have accepted the sum as being fair and reasonable without the need for the respondent to prove its claim. It was therefore wrong for the learned judge to make such a substantial award without proof of damages. As it was quite impossible to assess damages with the evidence available, I accordingly made the award of nominal damages and to that extent, the appeal was allowed with costs.